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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and
Respondent,

v.

HUMBERTO GONZALEZ,

Defendant and
Appellant.

B293181

(Los Angeles County
Super. Ct. No. LA084787)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph A. Brandolino, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, Thomas C. Hsieh, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendant and appellant Humberto Gonzalez guilty of lewd act upon a child (Pen. Code, § 288, subd. (a)¹ [count 1]), continuous sexual abuse of a child (§ 288.5, subd. (a) [count 2]), and sexual penetration by foreign object (§ 289, subd. (i) [count 3]).²

Gonzalez was sentenced to 22 years 8 months in state prison, consisting of the upper term of 16 years in count 2, plus a consecutive middle term of 6 years in count 1, and a consecutive term of 8 months in count 3 (one-third the middle term).

Gonzalez contends that the trial court erred in denying his motion for new trial on the basis of juror bias.

We affirm the judgment.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² The jury found Gonzalez not guilty in count 4 of oral copulation of a person under the age of 16. (Former § 288a, subd. (b)(2).)

FACTS

Prosecution

The Charged Offenses

L. was born in November 2002, and was 15 years old at the time of trial.³ Gonzalez was L.'s father.

Gonzalez and L.'s mother, Michelle, separated when L. and her younger brother N. were young. The children lived with Michelle until L. was nine or ten years old. They were removed from Michelle's home because Michelle's boyfriend physically abused N., and Michelle abused L.

The children then lived with Gonzalez and his girlfriend Sofia in a one-bedroom apartment.

When L. was in the seventh grade, Gonzalez started kissing her on the mouth like a "husband and wife." When L. was in the eighth grade, Gonzalez and Sofia had a daughter. Sofia and the baby slept in the bedroom. Gonzalez, L., and N. slept in the living room. L. slept on a bed against a wall, N. had his own bed, which was against another wall, and Gonzalez slept on the couch. Gonzalez began getting into bed with L. after everyone was asleep. He would lie down behind her, pull her butt closer to him, and put his penis "in the middle of [her] butt." Gonzalez would return to the couch before morning. Around the summer of

³ We refer to the victim and other juveniles involved by their initials to protect their privacy.

2016, Gonzalez started touching L.'s breasts and vagina about once a week. L. would pretend she was asleep. Gonzalez did not always touch her vagina, but about ten times he used his fingers to rub it.

In November of 2016, two days after L.'s 14th birthday, Gonzalez climbed into L.'s bed, touched her, and orally copulated her. L. kicked, and Gonzalez left her bed. Later, Gonzalez returned to L.'s bed, put his penis between her buttocks, and "dry hump[ed]" her.

On November 14, 2016, L. told her friend M. about these incidents. On November 16, 2016, the police arrived at the apartment and removed L. from Gonzalez's home. L. told the police what had happened, but only told them the "bare minimum" because she felt that no one cared.

The Investigation

Los Angeles Police Department Detective Lambarth had investigated numerous child sexual abuse cases. He testified that "delayed reporting" was common in cases involving sexual abuse of a child. Common reasons for delayed reporting in child sex abuse cases include societal stigma, discomfort with discussing the incidents, involvement of a family member or trusted individual, and safety concerns.

Detective Lambarth interviewed Gonzalez several times. In a recorded interview conducted on November 17, 2016, Gonzalez initially denied that he ever touched L.'s

vagina or breasts. Later in the interview he said that he never intentionally touched L.'s vagina and was never aware of doing so.

Later on the same day, Detective Lambarth conducted a second recorded interview of Gonzalez. Detective Lambarth told Gonzalez that a DNA report showed he had touched L.'s vagina.⁴ Gonzalez repeatedly stated that he did not "consciously" or intentionally touch L.'s vagina, was not aware of doing so, did not remember doing so, and did not know how his DNA was on her vagina. Gonzalez also said he believed L. told the truth when she said he had touched her, that he would tell her it was his fault and that he was sorry, but that he was not aware of touching her.

Prior Abuse of Holly B.

Holly is L.'s aunt and the sister of L.'s mother Michelle. On November 16, 2016, the day L. and N. were removed from Gonzalez's home, someone from the Los Angeles County Department of Children and Family Services (DCFS) called Holly and reported the removal. When the DCFS worker told Holly about L.'s allegations against Gonzalez, Holly remembered an incident with Gonzalez from her own childhood. The DCFS worker gave Detective Lambarth's name to Holly, and she called the detective the next day to report the following:

⁴ This was a ruse.

When Holly was about 13, Michelle ran away from home. Holly and Michelle were close in age; Michelle was older. Holly met with Michelle after school one day, and saw that Michelle was pregnant. Michelle and Holly went to a house where Michelle and Gonzalez, who was her boyfriend, rented a room. Holly spent the night with them and slept on a makeshift bed on the floor. Gonzalez and Michelle slept on a bed. In the middle of the night, Holly woke up to Gonzalez groping her butt. Gonzalez pulled Holly's pants down below her butt, touched her vagina, and tried to insert his fingers. Holly rolled onto her back and Gonzalez stopped. Holly told Michelle what had happened the next morning.

Defense

On November 17, 2016, forensic nurse Ann Allison interviewed L. L. told Allison that Gonzalez had touched her vagina where she "peed," but not inside her vaginal canal. Allison asked if Gonzalez touched her vagina with his mouth, and L. responded no. She said that Gonzalez had never touched any other part of her body. L. said the only person she had told about Gonzalez was M. In Allison's experience, sexual abuse victims do not initially talk about all acts of abuse, but do disclose additional instances of abuse in subsequent interviews.

M. was Sofia's cousin. She was 16 years old at the time of trial. M. and L. would "hang out" whenever M. and her

mother visited with Sofia. In November 2016, L. told M. that Gonzalez touched her. M. told L. to talk to a counselor.

Evie Ball was the therapist for Gonzalez's family from April or May of 2013 until September of 2015. She met with the family weekly, and met with L. alone about two times. L. never mentioned anything about her relationship with Gonzalez that made Ball uncomfortable.

DCFS Investigator Jeff Steinhart investigated allegations of abuse when L. and her brother N. lived with Michelle in 2013. Years later, Steinhart investigated allegations that Gonzalez had sexually abused L. Steinhart interviewed L. on December 15, 2016. L. stated that over a period of few months, Gonzalez had touched her vagina over her underwear six times, and had touched her vagina skin-to-skin once. L. also said Gonzalez had dry humped her. L. did not mention any other type of sexual abuse.

On December 15, 2016, Steinhart interviewed Holly. Holly described an incident in which she woke up with Gonzalez touching her vagina over her clothes. Gonzalez tried to pull Holly's pants down, but Holly rolled over to prevent him from touching her bare skin.

Paul Jurgens was L.'s middle school counselor. Jurgens noticed that L. was unhappy with Gonzalez's girlfriend Sofia on a few occasions when Sophia came to the school.

L.'s brother N. never noticed Gonzalez in L.'s bed with her. L. and Sofia argued often.

DISCUSSION

Gonzales contends the trial court erred in denying his motion for new trial. He argues that Juror No. 1 made the improper inference that Gonzalez impregnated Michelle when she was in middle school, and committed misconduct by using the inference to argue in deliberations that Gonzalez was a “pedophile” with a pattern of abusing children, and that the jury should convict him to prevent him from sexually abusing his youngest daughter. The Attorney General asserts that the only competent evidence Gonzalez presented to the trial court in the hearing on the motion for new trial was another juror’s declaration, which stated that “other jurors” had convinced him Gonzalez’s behavior was a pattern that would continue if he was released, and that Gonzalez would abuse his youngest daughter. The Attorney General argues that the trial court did not err, because these reported comments of “other jurors” do not constitute misconduct, but that even if they did, the error was not prejudicial. We agree that no misconduct occurred.

Procedural History

Motion to Release Juror Information

After Gonzalez was convicted, he moved for the release of juror identifying information. Gonzalez argued that one of

the jurors may have persuaded others to convict him because Gonzalez impregnated Michelle when she was underage. Gonzalez asserted that any statements the juror made about his relationship with Michelle in deliberations were improper because the trial court had granted Gonzalez's motion to exclude evidence of their relationship.

The motion was supported by defense counsel's declaration that "after rendering their verdicts on June 4, 2018, the jurors remained in the hallway outside the courtroom to discuss their deliberations and how they reached their verdicts. Juror #1 disclosed that he had persuaded the other jurors to find Mr. Gonzalez guilty because he was convinced that Mr. Gonzalez is a pedophile. Juror #1 explained that, after breaking from jury deliberations on Friday, June 1, 2018, he was very troubled by the jury's inability to reach verdicts, and that [the] case had been 'keeping him up all weekend' because he was certain that Mr. Gonzalez is a pedophile, that pedophiles do not stop victimizing children until they are 'caught,' and he was aware that Mr. Gonzalez had a daughter at home who is toddler age. Juror #1 indicated that he felt a responsibility to ensure that Mr. Gonzalez was convicted in order to protect 'future victims.' Juror #1 indicated that he knew that Mr. Gonzalez is a pedophile because he was able to deduce that Mr. Gonzalez had impregnated Michelle [] when she was middle school age, based on the testimony of Holly [] that she and Michelle are close in age, and that she was in middle

school when she learned that Michelle was pregnant with Mr. Gonzalez's child."

At the hearing on the motion, defense counsel argued that juror information should be released to allow him to question the jury about statements Juror No. 1 may have made "to the other jurors to the effect that the evidence presented in this case, specifically, the evidence that Mr. Gonzalez impregnated [Michelle] at around the time she was a middle schooler; therefore, he's a pedophile, and whether or not the evidence convinces you or whether or not you believe [L.] beyond a reasonable doubt, whether or not you find Holly credible beyond a reasonable doubt, because he's a pedophile, you should convict him because we know pedophiles don't stop until they're caught, and he has access to a child."

The trial court responded, "I did allow [the prosecutor] to elicit they were close in age and the circumstances of their relationship. I'm talking about Holly and [Michelle]. Okay? And I allowed that to be elicited to show the circumstances surrounding, I think, what was necessary to the jurors to evaluate the credibility of Holly for the [Evidence Code section] 1108 evidence that she was presenting. So I allowed it in. So [Juror No. 1] did not consider anything that was not allowed into evidence by the court. He just made a deduction or an argument based on a deduction that, possibly, wasn't proper, that you're arguing was improper. ¶] . . . nothing extrinsic was considered"

The prosecutor countered that the motion was a “fishing expedition” based on speculation as to what a juror may have said in deliberations, which was an insufficient basis to release juror information.

The trial court agreed that “there is a certain amount of speculation being engaged in by the defense in making their arguments,” but granted the motion out of an abundance caution.

The jurors were asked for permission to release their information to defense counsel and an investigator, and identification information was released for those jurors who consented.

Motion for New Trial

After interviewing the jurors, Gonzalez moved for a new trial, claiming juror misconduct. He attached the declaration of Juror No. 9, which stated: “I initially thought Mr. Gonzalez was not guilty because I did not believe Holly’s testimony. I did not think Holly should have been brought to testify at the trial. The other jurors pushed me to change my opinion because they did not think the ‘little girl’ would lie. The other jurors all believed the doctors’ and the counselor’s testimony. [¶] The other jurors convinced me that Mr. Gonzalez’s behavior was a pattern. The other jurors said that Mr. Gonzalez would continue his behavior if he was released. There was discussion that Mr. Gonzalez would move on to his younger daughter if he was out. The

jurors said something like, ‘If he touched young girls then, why wouldn’t he touch young girls in the future?’”⁵

At the hearing, defense counsel argued, “reading between the lines in the declaration,” Juror No. 9 was “saying he’s not inclined [to find Gonzalez guilty].” Defense counsel stated that Juror No. 9’s declaration “corroborates . . . that Mr. Gonzalez definitely had touched Michelle when she was a minor,” and that the fact that Gonzalez had also touched Holly and L. when they were teenagers “established, in Juror number 1’s mind -- and Juror number 1 argued and made these statements in deliberations -- that Mr. Gonzalez was a pedophile, that his behavior was a pattern, that he was someone who touched young girls, and that there had been in the audience a young -- or that there had been evidence that Mr. Gonzalez had a baby with his girlfriend, Sophia. . . .” Defense counsel continued, “Juror number 1 argued -- and Juror number 9 heard these statements made - - that, ‘you need to convict Mr. Gonzalez because he has this young daughter, and if you don’t convict him, he could victimize her in the future. He might touch her. We know that he touches young girls because of what happened with Michelle, and, even if you don’t believe Holly, even if you

⁵ The only declaration attached to the Motion for New Trial was the declaration of Juror No. 9, however, the motion also purported to incorporate all prior filings in the case. At the hearing on the motion, Gonzalez’s counsel also relied on counsel’s own declaration, filed in connection with the motion to release juror information, reporting the statements made to him by Juror No. 1 after trial.

don't believe [L.]' -- which they -- these jurors argued to Juror number 9 -- 'you should believe [L.] because we don't think [L.] would lie. But even if you don't believe [L.], you have to believe that Mr. Gonzalez has a pattern because he did touch Michelle. And if he touched Michelle, then why wouldn't he touch young girls in the future.'"

The trial court ruled that the declaration from Juror No. 9 was the only competent evidence before it, and that the court could not consider statements made by Juror No. 1 (reflected in counsel's declaration). With respect to the declaration of Juror No. 9, the trial court further ruled that it could only consider the statements other jurors made, whether the statements amounted to misconduct, and whether the statements were prejudicial. The trial court stated that it could not take into consideration the effect the statements had on Juror No. 9. The trial court denied the motion, reasoning: "It appears what [Juror No. 9 is] saying here is that the other jurors believed the evidence. So it's not that they're saying, 'Well, he's a danger in the future, so we should convict him.' They're saying, the way I read it, 'The People have met their burden of proving the case beyond a reasonable doubt.' [¶] And if you believed all the evidence and agreed to that, then it's not inappropriate for a juror to characterize the defendant as someone who engages in a pattern, because the court allowed it and it was proper [Evidence Code section] 1108 evidence, that there was another victim. So they can certainly argue that it's a pattern. I don't think it's inappropriate. [¶] It's one thing to

say, ‘We don’t think the People have proven it beyond a reasonable doubt, but he’s a predator, so we’ll convict him.’ That’s not what [it] appears that the jurors were saying.”

Legal Principles

““The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution.” [Citations.]’ [Citation.]” (*Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 58 (*Ovando*)). “A verdict may be vacated, in whole or in part, on a motion for a new trial because of juror misconduct that materially affected the substantial rights of a party.” (*Id.* at p. 57.)

“When a party seeks a new trial based upon jury misconduct, a court must undertake a three-step inquiry. The court must first determine whether the affidavits supporting the motion are admissible. (See Evid. Code, § 1150, subd. (a).) If the evidence is admissible, the court must then consider whether the facts establish misconduct. [Citation.] Finally, assuming misconduct, the court must determine whether the misconduct was prejudicial. [Citations.] A trial court has broad discretion in ruling on each of these questions and its rulings will not be disturbed absent a clear abuse of discretion. [Citation.]’ [Citation.]” (*People v. Bryant* (2011) 191 Cal.App.4th 1457, 1467 (*Bryant*)).

In ruling on the denial of a motion for new trial based on juror misconduct, “[w]e accept the trial court’s credibility determinations and findings on questions of historical fact if supported by substantial evidence.” (*People v. Nesler* (1997) 16 Cal.4th 561, 582.) “[W]hether those facts constitute misconduct . . . [is] a legal question we review independently.” (*People v. Collins* (2010) 49 Cal.4th 175, 242.)

“Upon seeking a new trial based on jury misconduct, the moving party must present admissible evidence that misconduct occurred.’ [Citation.]” (*Bryant, supra*, 191 Cal.App.4th at pp. 1468–1469.) “Evidence Code section 1150 authorizes the use of jurors’ affidavits to show objective facts which occurred in the jury room and could have improperly influenced the jury. [Citation.] However, a jury verdict may not be impeached by hearsay affidavits. [Citation.]” (*Id.* at p. 1468, quoting *People v. Villagren* (1980) 106 Cal.App.3d 720, 729–730; see, e.g., *People v. Mora and Rangel* (2018) 5 Cal.5th 442, 518 [defense counsel’s hearsay accounting of what jurors said not competent evidence]; *People v. Cox* (1991) 53 Cal.3d 618, 697 [investigator recounting conversation with juror not competent evidence], disapproved of on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390; *People v. Williams* (1988) 45 Cal.3d 1268, 1318–1319 [same], abrogated on other grounds by *People v. Diaz* (2015) 60 Cal.4th 1176.) “Evidence of jurors’ internal thought processes ordinarily is not admissible to impeach a verdict. (Evid. Code, § 1150,

subd. (a); *People v. Hutchinson* (1969) 71 Cal.2d 342, 349–350.) Evidence is admissible to impeach a verdict only if the evidence refers to objectively ascertainable statements, conduct, conditions, or events. (Evid. Code, § 1150, subd. (a); *In re Hamilton* [(1999)] 20 Cal.4th [273,] 294.)” (*Ovando*, *supra*, 159 Cal.App.4th at p. 58, fn. omitted.)

In exercising its discretion as to whether to grant a new trial based on juror comments during deliberations, courts must be cognizant of the reality that, “[n]ot all comments by all jurors at all times will be logical, or even rational, or, strictly speaking, correct. But such comments cannot impeach a unanimous verdict; a jury verdict is not so fragile.” (*People v. Riel* (2000) 22 Cal.4th 1153, 1219 [no abuse of discretion denying motion for new trial where juror expressed an incorrect personal opinion during deliberations on penalty phase of death penalty trial that court will commute a death verdict].)

Analysis

In support of his contention that the trial court erred in denying his motion for new trial based on juror misconduct, Gonzalez objects to four juror statements allegedly made during deliberations: (1) Juror No. 1’s reference to Gonzalez as a “pedophile;” (2) Juror No. 1’s inferred statement that L’s mother was in middle school when Gonzalez impregnated her; (3) “other jurors” statements that Gonzalez had a pattern of criminal behavior; and (4) “other jurors”

statements that Gonzalez would sexually abuse his youngest daughter who still lived with him if not convicted.

We agree with the trial court that defense counsel's hearsay affidavit regarding Juror No. 1's purported statements is not competent evidence of juror misconduct, and we will not consider the statements contained therein. (*Bryant, supra*, 191 Cal.App.4th at p. 1468; Evid. Code, § 1150, subd. (a).) This squarely rules out our consideration of Juror No. 1's purported statements that Gonzalez was a "pedophile" and that L.'s mother was in middle school when he impregnated her, which are contained only in defense counsel's hearsay affidavit.

Juror No. 9's sworn declaration is proper evidence for our consideration, but only insofar as it relates actual statements made by other jurors and not the effect of those statements on Juror No. 9. (*Ovando, supra*, 159 Cal.App.4th at p. 58 ["Evidence is admissible to impeach a verdict only if the evidence refers to objectively ascertainable statements, conduct, conditions, or events"].) As only "objectively ascertainable statements" are competent to impeach the verdict, we will review only the statements actually attested to in Juror No. 9's declaration, and will not "read between the lines," as defense counsel urged the trial court to do. (*Ibid.*) We address only the "other jurors'" statements described in Juror No. 9's declaration: (1) that Gonzalez had a pattern of criminal behavior, and (2) that Gonzalez would sexually abuse his youngest daughter if not convicted. We reject both asserted bases for juror misconduct.

First, as the trial court noted, the jury is permitted to consider the defendant's propensity to commit acts of sexual abuse against children based on prior sexual abuse of a child under Evidence Code section 1108. "[B]y enacting [Evidence Code] section[] 1108 . . . , the obvious intention of the Legislature was to provide a mechanism for allowing evidence of past sexual offenses . . . to be used by a jury to prove that the defendant committed the charged offense of the same type; recidivist conduct the Legislature has determined is probative because of its repetitive nature." (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1333.) Here, the jury was properly instructed under CALCRIM No. 1191 (Evidence of Uncharged Sex Offense) that if it found the prosecution had proven that Gonzalez had committed the offense of lewd act upon a child (§ 288, subd. (a)) against Holly by a preponderance of the evidence, it was permitted to "conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did commit the offenses as charged here." In short, the jury could infer a propensity to commit future crimes and a likelihood of engaging in a pattern of sexual abuse from Gonzalez's offense against Holly, which could be considered as one factor suggesting Gonzalez's guilt in the charged offenses.⁶

⁶ The jury was not permitted to decide Gonzalez's guilt on this inference alone, and was properly instructed that

Even if the jury did not find Holly's testimony credible, the prosecution presented substantial evidence that Gonzalez sexually abused L. on multiple occasions.⁷ Gonzalez was charged with committing a lewd act upon L. between January 1, 2015 and May 31, 2016; committing three acts of "substantial sexual conduct" against L. (continuous sexual abuse of a child, § 288.5, subd. (a)) between June 1, 2016 and November 7, 2016; and sexual penetration by foreign object on or about November 10, 2016. Thus, Gonzalez's convictions required proof beyond a reasonable doubt of a minimum of five incidents of abuse of L. over a period of approximately two years. A reasonable juror who found proof of these incidents beyond a reasonable doubt could conclude that Gonzalez had engaged in a "pattern" of criminal conduct on the basis of the crimes against L. alone. Juror No. 9's declaration indicates that the "other jurors" who made the challenged statements believed L.'s testimony. There is no indication that they did not believe Gonzalez was guilty beyond a reasonable doubt, or that they urged Juror No. 9 to find Gonzalez guilty because he had a "pattern" of criminal conduct even if the prosecution had not presented proof beyond a reasonable

Holly's testimony was not sufficient to support a conviction absent other evidence.

⁷ Gonzalez does not dispute that the evidence was sufficient to support his convictions.

doubt of the charged offenses. We cannot conclude that juror misconduct occurred on this basis.

Nor does Gonzalez make out a case of juror misconduct based on Juror No. 9's reference to there having been juror discussion that Gonzalez, if released, would continue his past behavior touching young girls in the future, including his younger daughter. As the trial court correctly observed, Juror No. 9's declaration falls short of asserting that the "other jurors" argued that Gonzalez should be convicted because he would harm his younger daughter, even if he had not sexually abused L. The prosecution presented substantial evidence demonstrating that Gonzalez was capable of sexually abusing, and did sexually abuse, his own child. It would be reasonable for the jurors, who found L. credible and had already concluded the charges of past abuse were true, to infer that Gonzalez could also be a danger to his youngest daughter in the future. Such an inference is not improper when supported by the evidence. (Cf. *People v. Hughey* (1987) 194 Cal.App.3d 1383, 1396 [prosecutor's "[s]uggest[ion] that a defendant will commit a criminal act in the future is not an inappropriate comment when there is sufficient evidence in the record to support the statement"].) And, as we discussed above, nothing in Juror No. 9's declaration indicates that the "other jurors" argued to convict Gonzalez on the basis of the inference that he could be a threat to his younger daughter in the future even if Gonzalez was not guilty beyond a reasonable doubt on the basis of the evidence of his crimes against L. We find no

juror misconduct on this basis, and conclude that the trial court did not err in denying Gonzalez's motion for new trial.

DISPOSITION

The judgment is affirmed.

MOOR, J.

We concur:

RUBIN, P. J.

KIM, J.